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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS

OF TEXAS

CHARLES LYNCH, APPELLANT

VS.

THE STATE OF TEXAS, APPELLEE

APPELLANT'S BRIEF IN RESPONSE TO STATE'S BRIEF IN SUPPORT OF PETITION FOR DISCRETIONARY REVIEW

FROM THE COURT OF APPEALS
FIRST DISTRICT OF TEXAS
IN HOUSTON
NO. 01-17-00668-CR

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ORAL ARGUMENT REQUESTED

LIST OF PARTIES

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Appellee	The State of Texas
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RULES

NO. PD-1089-20

IN THE

COURT OF CRIMINAL APPEALS

OF TEXAS

CHARLES LYNCH, Appellant

v.

THE STATE OF TEXAS, Appellee

From the First Court of Appeals
Houston, Texas
No. 01-147-00668-CR

APPELLANT'S BRIEF IN RESPONSE TO STATE'S BRIEF ON PETITION FOR DISCRETIONARY REVIEW

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Now comes Charles Lynch, by and through his attorney of record Joel H. Bennett, of Sears, Bennett, & Gerdes, LLP, and files this brief.

STATEMENT OF THE CASE

Appellant was charged by indictment with Possession with the Intent to Deliver a Controlled Substance, PG1 4 grams-200 grams, with one enhancement paragraph. CR—5.

Appellant pled not guilty to the allegation and a trial by jury began on July 17, 2017. CR—50; RRII—13-14. After hearing the evidence and argument of counsel, the jury found Appellant "guilty" as alleged in the indictment. RRIV—64-65; CR—66. Prior to trial, Appellant elected to have the judge assess punishment, and after hearing evidence and argument of counsel on the issue of punishment, the judge sentenced Appellant to forty-five (45) years in the Texas Department of Criminal Justice—Institutional Division. RRII—11-12; RRV—26. Judgment and Sentence was entered and signed on July 20, 2017; as well as the trial court's certification of Defendant's right to appeal. CR—68-72, 73. Notice of Appeal was timely filed on the same day. CR—75.

PROCEDURAL HISTORY OF THE CASE

The First Court of Appeals reversed Appellant's conviction by written opinion issued on October 13, 2020. The First Court of Appeals held the trial court abused its discretion during the guilt/innocence phase of the trial when it admitted two prior narcotics convictions. The opinion was published; *Lynch v. State, 612 S.W.3d 602 (Tex. App.—Houston [1ST Dist.] 2020, pet. granted)*. This

Court granted the State's Petition for Discretionary Review on February 3, 2021. The State filed its brief on March 22, 2021. Appellant files this brief in response.

STATEMENT OF FACTS

The police executed a search warrant at Appellant's residence and arrested him for Possession of a Controlled Substance, to-wit: cocaine, with the intent to deliver. RRIII-22-24. Tina Moreno was also present at the location when the warrant was executed, but she was not arrested. RRIII-23.

In Defense Exhibit No. 2, Moreno initially claimed the crack cocaine as hers but after police questioning, she retracted her statement and said it was not hers. RRVI-Def. Ex 2 at 7:05-7:13. The police also asked her: "Have you ever seen him sell crack out of here?"; she responded, "Yes sir". RRVI—Def. Ex. 2 8:30-8:36.

Tino Moreno testified on behalf of the defense. RRIII-152. She testified that the drugs that the police found were her drugs. RRIII-153. She further testified that Appellant did not have any knowledge of those drugs nor any knowledge of drug sales in the house. RRIII-153. She denied that Appellant knew she was using or selling

drugs, and that Appellant would not approve of her using or selling drugs in the home. RRIII-153. Appellant also introduced affidavits from Ms. Moreno, Defense Exs. # 3 & 4. In these affidavits, Ms. Moreno stated that Appellant did not have knowledge of the controlled substance that was in Appellant's house and the drugs belonged to her. RRIII-156-157.

Ms. Moreno testified that she lived at the residence. RRIII-157. Moreno testified that she completed the second affidavit because on the video (Defense Ex. # 2) she stated the drugs were hers but at the end of the video, the police intimidated her into saying the drugs were Appellant's. RRIII-158.

During cross-examination of Ms. Moreno, the State impeached Ms. Moreno with two felony theft convictions and four misdemeanor theft convictions. RRIII-165-166. The State further impeached her prior statement that she had no drug convictions with a marijuana arrest (which was dismissed). RRIII-166. Ms. Moreno testified that she smoked crack cocaine and hid it from Appellant; Appellant did not approve of her smoking crack. RRIII-177, 179.

To impeach Ms. Moreno's testimony that the crack cocaine was hers and that she would sell crack cocaine, the State introduced a text string between Moreno and Appellant from a phone extraction report. State Ex. # 57. In this exhibit, Moreno repeatedly asked Appellant to bring her something to "smoke". Moreno even texted Appellant, "So you can do it for everyone else but you can't do it for me." State Ex. 57 (row 3). Moreno also texted Appellant on September 3, 2015 (20 days before the search warrant) "...I'm in my addiction and I can't find the way out even thou it's right in my face…I don't know what is wrong with me…". State Ex. 57 (row 12).

After the introduction of the text messages which impeached her testimony, the State offered four prior convictions of Appellant to further rebut Appellant's evidence that another individual was the person responsible for the possession and intent to deliver. RRIV-5-6. It was offered to rebut defensive theory, evidence of intent, and absence of mistake. RRIV—6. Appellant objected under 404 that evidence of other crimes and bad acts are not admissible to show conformity. RRIV—7. Additionally, Appellant drew a

distinction between the two possession of controlled substance cases and the two possession with intent to deliver cases, arguing that mere possession does not meet the same element requirements—namely, the intent to distribute. RRIV—9.

Appellant further objected to the lack of evidence regarding the similar characteristics between the present case and the prior cases. The pen packets alone do nothing to establish any type of distinctive or common characteristics. RRIV—9-10. Appellant pointed out that the cases offered by the State involved actual testimony of witnesses and not just pen packets offered to show prior convictions. RRIV—11. Appellant noted that each of the State's cases offered in support of the introduction of extraneous offenses included common characteristics; the introduction of a pen packet has no such common characteristics. RRIV—11-12. Appellant further objected to remoteness of the convictions. RRIV—13.

Appellant also objected on the grounds that the probative value would be substantially outweighed by the prejudicial effect. RRIV—14.

The four convictions being offered by the State were:

1. Possession of a Controlled Substance < 28 grams, methamphetamine from 1990, sentenced to 2 years;
2. Possession of a Controlled Substance with the Intent to Deliver 4-200 grams, cocaine from 2005, sentence to 10 years;
3. Possession of a Controlled Substance, 4-200 grams, cocaine from 2006, sentenced to 10 years;
4. Possession of a Controlled Substance with the Intent to Deliver 4-200 grams, cocaine from 2006, sentence to 10 years.

RRIV—14-15.

The State responded that Appellant's argument addresses two exceptions not being used by the State—namely modus operandi and motive. RRIV—15-16. The State is offering to show absence of mistake and intent. RRIV—16.

After considering the argument of counsel and the submitted case law, the trial court allowed the introduction of the two convictions for possession with intent to deliver and excluded the two convictions for

simple possession. RRIV—24-25. The court further instructed the State to redact the enhancement paragraph from the indictment and disciplinary reports. RRIV—25.

The State offered the pen packet with the two convictions. RRIV—30. Appellant renewed his objections under 404 and 403; the trial court overruled these objections and admitted the evidence. RRIV—30. The trial court gave a limiting instruction, as requested by Appellant. RRIV—31-32.

FIRST AND SECOND GROUND FOR REVIEW

THE COURT OF APPEALS CORRECTLY FOUND THAT THE TRIAL COURT JUDGE ABUSED HER DISCRETION IN ADMITTING INTO EVIDENCE TWO PRIOR EXTRANEOUS OFFENSE JUDGEMENTS. ABSENT ANY EVIDENCE OF CONTEXT OF THE PRIOR OFFENSES PLUS THE REMOTENESS OF THOSE OFFENSES, THE PROBATIVE VALUE OF SUCH EVIDENCE WAS SUBSTANTIALLY OUTWEIGHED BY THE UNFAIR PREJUDICIAL EFFECT.

SUMMARY OF ARGUMENT

The Court of Appeals correctly held that absent some additional evidence to guide the jury to conclude that the circumstances of the convictions were similar to the alleged conduct, the unfair prejudicial effect of the two prior pen packets substantially outweighed any probative value the evidence might have. The Court of Appeals correctly balanced the prejudicial effect as compared to

any probative value of the evidence. Simply introducing two prior convictions from over ten years prior to the alleged offense is simply telling the jury, he did it before so he must be doing it again. This is exactly the type of improper character conformity evidence that is prohibited.

ARGUMENT AND AUTHORITIES

Appellant was charged with possession of a controlled substance, to-wit: cocaine, in the amount of 4 grams or more but less than 200 grams, with the intent to deliver. CR-5. Every charge has certain elements that the State is required to prove beyond a reasonable doubt.

"The elements of possession of a controlled substance with intent to deliver are that the defendant:

(1) possessed a controlled substance in the amount alleged;

(2) intended to deliver the controlled substance to another; and

(3) knew that the substance in his possession was a controlled substance."

Erskine v. State, 191 S.W.3d 374, 379 (Tex. App.—Waco 2006, no pet.) citing Nhem v. State, 129 S.W.3d 696, 699 (Tex. App.-Houston [1st Dist.] 2004, no pet.).

Several of these elements were not contested at trial, namely: that the substance was a controlled substance (cocaine), the amount of cocaine, and the amount was an amount for delivery.

The only remaining element was whether Appellant, not someone else, is the one that possessed the cocaine. Appellant did not argue or present any evidence that he knew the substance was there but was unaware that it was a controlled substance. The evidence presented by the defense was that Appellant did not want cocaine at the house and that Appellant did not approve of Moreno's use of cocaine. The sole contested issue at trial was whether Appellant possessed the cocaine or did Tina Moreno possess the cocaine without Appellant's knowledge.

One of the fundamental tenants of Due Process and a fair trial is that a defendant cannot be tried for being a criminal generally. This Court has explained this long held fundamental axiom:

> "It is now axiomatic that a defendant is to be tried only on the crimes alleged in the indictment

> and not for being a criminal generally. Thus, evidence of extraneous offenses or bad acts committed by the defendant may not be introduced during the guilt/innocence portion of the trial to show the defendant acted in conformity with his criminal nature. This is because evidence of extraneous offenses is inherently prejudicial, tends to confuse the issues in the case, and forces the accused to defend himself against charges which he had not been notified would be brought against him. We have also recognized that a greater prejudice to the defendant results from the revelation of past criminal conduct than non-criminal bad acts."

Abdnor v. State, 871 S.W.2d 726, 738 (Tex. Crim. App. 1994)(Citations omitted).

To rebut the defensive theory that Moreno possessed the cocaine without Appellant's knowledge, the State offered, and the trial court permitted, a pen packet showing that Appellant had been twice convicted of Possession of Controlled Substance with intent to deliver. The State argued at trial, and on appeal that the State had no other evidence to rebut Ms. Moreno's testimony. This is false.

Prior to introducing the pen packets showing the two prior extraneous convictions, the State introduced, over Appellant's objections, text messages between Moreno and Appellant in which Moreno repeatedly asked

Appellant to bring her drugs to smoke. Moreno even texted Appellant, "So you can do it for everyone else but you can't do it for me." State Ex. 57 (row 3). Further, in these text messages, Moreno admitted that she was "in her addiction and can't find the way out". In her testimony. Moreno admitted that the addiction she referenced was "crack cocaine, cigarettes". RRIII-222.

The State had already presented evidence that Appellant knew about her addiction, that she would ask him to bring her drugs to smoke, and that he did it "for everyone else". The State has already impeached Moreno on the two issues the State claims to have had no other evidence to rebut except for the two prior convictions.

Evidence of extraneous offenses can be introduced to refute defensive theories. Evidence of other crimes may also be admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." *Tex. R. Evid. 404(b)*. As the First Court of Appeals correctly stated in their opinion in this case, "It is not admissible to prove the 'character of a person in order to show that he acted in

conformity therewith.' *Id.* Before extraneous offense evidence can be admitted, it must also satisfy the balancing test established in Rule of Evidence 403, which states that evidence is admissible if and only if its probative value is not substantially outweighed by its unfair prejudicial effect. *TEX. R. EVID. 403; see Gigliobianco v. State, 210 S.W.3d 637, 640 (Tex. Crim. App. 2006); Montgomery v. State, 810 S.W.2d 372, 388 (Tex. Crim. App. 1990)." Lynch v. State, 612 S.W.3d 602, 610 (Tex. App.—Houston [1ST Dist.] 2020, pet. granted.).*

Under *Tex. R. Evid. 403*, relevant evidence may be excluded if the danger of the unfair prejudicial value of such evidence substantially outweighs the probative value of the evidence. "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." As previously cited, this Court has long recognized "that a greater prejudice to the defendant results from the revelation of past criminal conduct than non-criminal bad acts." *Abdnor v. State, 871 S.W.2d at*

738.

The introduction of the two prior convictions for the exact same crime for which Appellant was on trial was overwhelmingly prejudicial. The balancing test requires a comparison of the probative value of the evidence to be weighed against the unfair prejudice against Appellant. Therefore, the first question has to be, what is the probative value?

The State cites a number of cases holding extraneous offenses in narcotics prosecution are admissible in order to rebut the defense's claim that he did not have the requisite knowledge and/or intent (See State brief p. 36-38.). This is true. But even when evidence may be admissible, the law still requires a balancing test to be applied. That test is to weigh the probative value of the evidence (is it slightly probative vs. very probative?) and then compare that with the unfair prejudicial effect of the evidence (is the unfair prejudice slight or great?).

The evidence already before the jury was that law enforcement had been investigating Appellant for a number of months. They were able to secure a search warrant

from a judge that permitted them to raid the residence. Appellant was present at the time the search warrant was executed. Additionally, the jury had already heard evidence—through the Defense's own exhibit—that Tina Moreno stated at the scene that the drugs were not hers and that had seen Appellant selling crack out of the residence.

Most importantly, the State had admitted and cross-examined Moreno on the text chain between her and Appellant. In this text chain, Moreno asked Appellant repeatedly to bring her stuff to smoke. She also stated in the text string that she was an addict and further testified that she meant crack cocaine (and cigarettes). When Appellant told her she did not need it (something to smoke), Moreno replied, "So you can do it for everyone else but you can't do it for me".

The dates of these texts were August 31, 2015 and September 2, 2015. The date of offense in this case is September 23, 2015. These communications were in close proximity to the date of offense.

To allow the State to additionally introduce two convictions for the exact same offense for which

Appellant was currently on trial was unnecessary, duplicitous, and added little, if any, probative new evidence. The State argued that the evidence was necessary to rebut the Defense's evidence. The State has continued this argument on appeal. But as explained previously, that statement is simply not true. The State had already introduced evidence that contradicted the testimony of Ms. Moreno on the two issues the State claimed to have no other evidence to rebut. It has done so with her own text messages and her testimony that the addiction was, in fact, for crack cocaine.

It was absolutely not necessary because other similar, evidence had already been introduced before the jury. By allowing such evidence, the trial court allowed Appellant to be convicted of being a drug dealer generally, and not just on evidence of this specific case.

Where is the line that is finally crossed where prior convictions become character conformity evidence? Under the State's suggested application of the law, any modicum of a defense presented against the State's case "opens the door" to the introduction of prior drug

convictions if the defendant has a prior drug related offense. Several of the cases cited by the State-specifically *Patterson v. State*, *723 S.W.2d 308, 313 (Tex. App.—Austin 1987), aff'd and remanded on other grounds, 769 S.W.2d 938 (Tex. Crim. App. 1989)*, under a literal interpretation of those opinions, would make prior convictions automatically admissible in every case. Those cases held that the State is required to prove intent and motive and that the prior convictions are independently relevant to that issue and are therefore admissible. Under these cases and the theory being asserted by the State, the exception swallows the rule—meaning that in a case involving controlled substances, prior drug activity, with or without convictions, is always admissible. This is simply cannot be the law. Further, once evidence is determined to be admissible, such evidence must still be subjected to a 403 balancing test.

Another factor to consider is the remoteness of the evidence. The two convictions introduced against Appellant were for crimes approximately 9 ½ year and 10 ½ years prior to the charged offense. The more remote the

extraneous offense is, the less probative value it has. "The remoteness of an extraneous offense does impact its probative value. *See, e.g.,* *Reyes v. State*, *69 S.W.3d 725, 740 (Tex. App.-Corpus Christi 2002, pet. ref'd).*" *Newton v. State*, *301 S.W.3d 315, 318 (Tex. App.—Waco 2009, pet. ref'd).*

The cases relied upon by the State demonstrate the need for proximity to be probative. For example, *Schwab v. State*, *125 S.W.3d 672 (Tex. App.—Houston [1ST Dist.] 203, pet. dism'd)*—extraneous was the same day as the charged offense; *Mason v. State*, *99 S.W.3d 652 (Tex. App.—Eastland 2003, pet. ref'd)*—the two extraneous offenses were two years *after* the charged offense; *Chavez v. State*, *866 S.W.2d 62 (Tex. App.—Amarillo 1993, pet. ref'd)*—extraneous offenses two days before the charged offense; *Shedden v. State*, *268 S.W.3d 717 (Tex. App.—Corpus Christi, pet. ref'd)*-trial court limited the proximity of the extraneous offenses in relation to the charged offense [no extraneous offense further back than 2000, and the alleged offense was in 2006]; *Howard v. State*, *713 S.W.2d 414 (Tex. App.—Fort Worth 1986) pet. ref'd per curiam, 789 S.W.2d 280 (Tex. Crim. App. 1988)*—

the extraneous offenses were "recent" and within the same conspiracy.

In this case, how does the prior offense make a fact of consequence in this trial more or less probable? How does a conviction from over 9 (date of offense was February 9, 2006 06CR0387) or over 10 (date of offense was April 15, 2005 05CR1539) years ago demonstrate that Appellant went into his bedroom on September 23, 2015? It just simply does not, other in the inappropriate terms of character conformity.

Additionally, the Court of Appeals correctly focused on the need for similarity between the charged offense and the extraneous offenses. "Presence of similarity between the prior act and the offense charged has been an important measure of probative value." *Robinson v. State, 701 S.W.2d 895, 898 (Tex. Crim. App. 1985)*.

The State argues that the cases relied upon by the Court of Appeals are all cases involving victims and attempts to distinguish cases involving controlled substances. The State further argues that the need for similarity is less when the issue is intent instead of identify. "The degree of similarity simply need not be

as great if offered to prove the issue of intent. *Smith*, *420 S.W.3d at 221 (citing Bishop v. State, 869 S.W.2d 342, 346 (Tex. Crim. App. 1993).*" State's brief p. 53.

These cases do not say that no that no similarity need be shown, but rather not to the same standard when identity is the issue. See, *Robinson*, *supra*. The Court of Appeals correctly relied upon this Court's holding in *Ford v. State, 484 S.W.2d 727, 730 (Tex. Crim. App. 1972)*:

> "[T]here will always be similarities in the commission of the same type of crime. That is, any case of robbery by firearms is quite likely to have been committed in much the same way as any other. What must be shown to make the evidence of the extraneous crime admissible is something that sets it apart from its class or type of crime in general, and marks it distinctively in the same manner as the principal crime."

This is exactly why the Court of Appeals correctly held that the introduction of a bare pen packet to show prior convictions, without some context, was error. There are many circumstances that could cause a person to be

guilty of Possession of a Controlled substance with intent to deliver: as a principal, as a party, did the person have the drugs on his person, was there a constructive delivery, were the drugs in a car, was there an investigation, was the discovery a random traffic stop, was the person seen leaving a known narcotics house, did the person sell to an undercover officer, were the drugs at his house, were the drugs at a separate location? All of these questions could show some similarity between the charged offense and the prior convictions.

In this case, the State introduced the prior convictions after Moreno testified that Appellant did not want cocaine at the house. If the prior convictions were for cocaine at Appellant's residence in 2005 or 2006, then there would be probative value from the prior convictions. If the 2005 and 2006 cases were from random traffic stops, then the prior convictions would have very little or no probative value regarding Appellant having cocaine at his residence. Absent some similarity, the only conclusion that can be reached is that since Appellant did it before, he must also have done it this

time. This is the essence of character conformity.

All but one of the cases (State's brief p. 36-38) relied upon by the State to prove that extraneous offenses are admissible to show intent and/or knowledge had live testimony from witnesses to demonstrate some contextual evidence regarding the prior convictions. The other case, *Patterson*, was silent on the issue of how the evidence was introduce.

Absent some contextual evidence showing similarities between the charged offense and the extraneous offenses, coupled with the lack of temporal proximity between the charge and the extraneous offenses, the probative value of the extraneous offenses is minimal at best. The State had already introduced, over the defense's objection, the text messages between Moreno and Appellant discussing her repeated requests to bring her drugs, her crack addiction, and her statement that "you do it for everyone else". This shows the State did not have a need to introduce further evidence, especially highly prejudicial evidence, to show intent, knowledge, or to rebut Moreno's testimony. The State had already introduced similar evidence. The trial court erred in permitting the State

to introduce the two prior convictions through the pen packet.

The review of the decision to admit such evidence is an abuse of discretion standard. "[A]ppellant argues that the trial court should have excluded the extraneous offense evidence...under *Rule of Evidence 403*, because the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. We review a trial court's ruling under the Rules of Evidence for an abuse of discretion. *Martin v. State, 173 S.W.3d 463, 467 (Tex. Crim. App. 2005)*. If the ruling was correct on any theory of law applicable to the case, in light of what was before the trial court at the time the ruling was made, then we must uphold the judgment. *Id.* We will uphold a trial court's ruling on the admissibility of evidence as long as the ruling was within the zone of reasonable disagreement. *Id.*" *Hung Phuoc Le v. State, 479 S.W.3d at 469–70*.

The trial court erred in admitting such evidence because the probative value of the evidence was, at most, minimal. The prejudicial value of the admission was overwhelming. "The admission of the extraneous

offense also prejudices the defendant because of the jury's natural inclination to infer guilt of the charged offense from the extraneous offenses." *Carter v. State, 145 S.W.3d 702, 710 (Tex. App.—Dallas 2004, pet. ref'd)*.

The trial court abused its discretion in permitting the introduction of two prior convictions for the same offense for which Appellant was on trial. "[If] the appellate court can say with confidence that by no reasonable perception of common experience can it be concluded that proffered evidence has a tendency to make the existence of a fact of consequence more or less probable than it would otherwise be, then it can be said the trial court abused its discretion to admit the evidence." *Montgomery v. State, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990)*.

This Court described the correct balancing test under *Tex. R. Evid. 403*:

"A Rule 403 balancing test includes the following factors:

(1) how compellingly the extraneous offense evidence serves to make a fact of consequence more or less

probable-a factor which is related to the strength of the evidence presented by the proponent to show the defendant in fact committed the extraneous offense;

(2) the potential the other offense evidence has to impress the jury 'in some irrational but nevertheless indelible way;'

(3) the time the proponent will need to develop the evidence, during which the jury will be distracted from consideration of the indicted offense; and

(4) the force of the proponent's need for this evidence to prove a fact of consequence, *i.e.*, does the proponent have other probative evidence available to him to help establish this fact, and is this fact related to an issue in dispute.

De La Paz v. State, *279 S.W.3d 336, 348-49 (Tex. Crim. App. 2009)*.

Under the facts of this case, the trial court abused her discretion in permitting the introduction of the pen packet showing Appellant had been twice before convicted of the same offense for which he was now on trial. An application of the four factors listed to evaluate

whether or not to admit extraneous offenses under 403 demonstrate the following:

1. First factor-The State argues this was strong but rapid evidence to rebut the testimony that appellant would have no knowledge or awareness of cocaine in his residence and that the appellant would not approve of the use or sale of cocaine from his own residence. The prior judgments simply do not show this, they only show he was twice convicted of the same offense in past. The two convictions do not show Appellant's knowledge or intent on that day due to both the lack of temporal proximity and zero information regarding the similarity, if any, between the prior convictions and the current charge. If the prior cases showed that he was dealing out of his house, or the drugs were found in his house, then potentially, it would. But that is not the evidence presented to the jury. If the evidence presented would have been, he would never have done this, he did not know what cocaine was, he saw it but thought it was some other substance,

then the prior convictions would have real evidentiary value. But those are not the facts of this case. There has to be some context to the bad act that makes it similar, otherwise the only value is character conformity. Plus, the temporal remoteness of these two convictions also lessens any potential probative value.

2. Second factor—The potential the other offense evidence has to impress the jury 'in some irrational but nevertheless indelible way;'; Extraneous offenses are inherently prejudicial. This Court has emphasized that criminal extraneous offenses are particularly inflammatory, that is why they are limited in the admissibility. The potential misuse of the evidence was compounded when the trial court gave the improper laundry list of how jury could use the extraneous evidence in the charge to the jury. State agrees that the jury instruction, which the jurors are presumed to have followed, was erroneous and expanded the use of the extraneous offenses. The improper use and unfair prejudicial value of the extraneous offense

was further heightened by the State. The State told the jury to use the prior judgments for the wrong and improper use during closing statement, emphasizing that Appellant had been convicted of being a drug dealer in the past and that is the "same exact reason why we are here today". RRIV—62.

3. Third factor is the amount of time need to develop the evidence. The amount of time used was minimal. This is true. But brevity for brevity sake is not always a good thing. This factor evaluates the "time to develop the evidence". There was no developing of the evidence, there was merely telling the jury Appellant has two convictions for this in the past. There was no context on how or why the prior convictions makes it more likely that he was aware of cocaine in his bedroom on September 23, 2015. Prior offenses from approximately a decade prior.

4. Fourth Factor—Does the proponent of the evidence have other probative evidence available to him to help establish this fact, and is this fact related

to an issue in dispute? The answer to this question is a resounding yes. The State had already introduced the text messages showing that Appellant was requested by Moreno to bring her drugs, that Moreno texted Appellant "you can do it for everyone else but not for me". Moreno testified that she was an addict of crack, a fact confirmed in the text messages already in evidence. The State argues in its brief there was no other evidence available from this record that better probative evidence was available to rebut Moreno's testimony. Additionally, her testimony was not surprise to the State. One of the affidavits had been filed with the District Clerk's Office and is part of the Clerk's Record. CR-35-37. They knew what she said at the scene. They had both affidavits well before trial. They had plenty of time to adequately and properly prepare to rebut this evidence but they did not. The State's failure to properly prepare for rebuttal of known defense evidence does not change the Rules of Evidence. And as previously noted,

the State not only had other evidence but had already introduced such evidence to the jury.

The Court of Appeals properly held that, as applied in this case and under these facts, the trial court abused her discretion in admitting the two prior convictions of Appellant for the very same offense for which he was on trial. The improper limiting instructions given by the trial court expanded the potential use of the extraneous offenses and failed to properly reduced the prejudicial effect. The four factors used to conduct the balancing equation under *Tex. R. Evid. 403* favor heavily against the admission of the two convictions, especially since the State had already introduced other evidence of drug dealing. Based on this fact alone, the need for such evidence was, at most, minimal. This minimal probative value, analyzed along with no contextual evidence and the remoteness of the two convictions prove that the trial court abused her discretion under the facts of this case.

For all the foregoing reasons, the State's First and Second Grounds for Review should be denied, the Court of Appeals decision should be affirmed, and the case

remanded for further proceedings.

THIRD GROUND FOR REVIEW

THE COURT OF APPEALS CORRECTLY APPLIED THE HARM ANALYSIS UNDER TEX. R. APP. 44.2(B) AND FOUND HARM TO APPELLANT. THE ERRONEOUS EVIDENCE CARRIED WITH IT EXTREME PREJUDICE. THIS ERROR WAS COMPOUNDED WHEN THE STATE IMPROPERLY ARGUED FOR THE JURY TO USE THE EVIDENCE AS CHARACTER CONFORMITY. PLUS, THE TRIAL COURT'S JURY INSTRUCTS IMPROPERLY EXPANDED THE USE OF THE EVIDENCE BEYOND THE PURPOSE OF WHY IT WAS ADMITTED.

SUMMARY OF ARGUMENT

The admission of the two extraneous convictions of Appellant for Possession with the Intent to deliver cocaine prevented Appellant from receiving a fair trial. The harm incurred in this case requires the case be remanded for a new trial. There can be no fair assurance that the erroneous admission of the extraneous offenses did not substantially influence the jury's verdict.

ARGUMENT AND AUTHORITIES

The harm analysis for the improper introduction of extraneous offenses is under *Tex. R. App. 44.2(b)*, non-constitutional error. "Here, the complained-of error is not of constitutional dimension. We must, therefore, disregard the error if it did not affect an appellant's

substantial rights. *See Tex. R. App. P. 44.2(b)*. A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict." *Carter v. State, 145 S.W.3d at 710*.

The Court of Appeals correctly set forth the review of the record in evaluating a case for harm. The Court of Appeals relied up *Bagheri v. State, 119 S.W.3d 755, 763 (Tex. Crim. App. 2003)*. In *Bagheri*, this Court held:

> "The question is not whether there was sufficient evidence to support the verdict. Instead, the reviewing court should consider the entire record when making this determination, including testimony, physical evidence, jury instructions, the State's theories and any defensive theories, closing arguments, and voir dire if applicable. *Motilla v. State, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002)*. Important factors are 'the nature of the evidence supporting the verdict, the character of the alleged error and how it might be considered in connection with other evidence in the case., *Id.* More specifically, the reviewing court

should consider whether the State emphasized the error, whether the erroneously admitted evidence was cumulative, and whether it was elicited from an expert. *Id.* at 356; *Solomon*, 49 S.W.3d at 365." *Bagheri v. State*, *119 S.W.3d at 763*.

Harm is assessed from the context of the error. *Johnson v. State*, *43 S.W.3d 1, 4 (Tex. Crim. App. 2001)*. Neither party has the burden to prove harm and ordinarily there is no way to prove actual harm. *Id. at 4*. Parties may assist by suggesting how an appellant was harmed, but the responsibility falls upon the reviewing court to decide whether it is likely that the error had some adverse effect on the proceedings. *Id. at 4*.

The admission of extraneous offenses is inherently prejudicial. That is exactly why they are generally not admissible, because the jury can use them to convict a person of being a criminal generally. The harm to Appellant was substantial. The State referenced the prior convictions in their final argument to the jury, emphasizing that Appellant had been convicted of being a drug dealer in the past and that is the "same exact reason why we are here today". RRIV—62. The trial court

compounded this error by incorrectly expanding the potential uses of the prior convictions by giving erroneous jury instructions. The State invited the jury to convict Appellant of being a drug dealer generally—he did it before so he must be guilty now.

Appellant fought to prevent the State from introducing the pen packet showing Appellant had twice before been convicted of the same general offense for which he was on trial. During this discussion, the State responded to these objections by arguing to the trial court that they were not offered for character conformity evidence. Then during final argument, the State argued for the jury to use the two prior convictions for character conformity.

The proper inquiry is whether the error of introducing the two prior convictions substantially swayed or influenced the jury's verdict or whether there grave doubt that this did occur. Grave doubt certainly exists in this case based upon the extreme unfair prejudicial effect prior convictions have on a defendant, the State's argument that the jury should find him guilty for the "same exact reason why we are here today", and

the improper jury instructions failed to properly limit the prejudicial effect. The Court of Appeals in this case correctly found harm and reasoned:

> "Given that the extraneous offense evidence was inherently prejudicial and possessed low probative value, and considering the record as a whole and the State's emphasis on the extraneous offense in closing argument, it appears the offenses were presented to improperly bolster the State's case. We cannot say with fair assurance that the erroneous admission of the offenses had only a slight influence on the jury or that their admission did not affect Lynch's substantial rights."

For all the foregoing reasons, Appellant's Third Ground for Review Issue should be denied, the Court of Appeals opinion sustained, and the case remanded for further proceedings.

CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, the Appellant, Charles Lynch, prays that the Judgment of the First Court of Appeals be sustained, and the case remanded for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that Appellant's Response Brief to the State's Brief in support of the Petition for Discretionary review has been served upon the Galveston County Criminal District Attorney's Office by email to alan.curry@co.galveston.tx.us. and the State Prosecutor's Office to Stacey Soule at information@spa.texas.gov on this the 17th day of May, 2021.

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Certificate of Compliance

In compliance with TRAP 9.4(i), I certify that the word count in this reply brief is approximately 6796 words.

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